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# Supreme Court of the United States

OCTOBER TERM, 1937

No. 181

A. HOWARD MYERS, *et al.*,
*Petitioners,*

*v.*

BETHLEHEM SHIPBUILDING CORPORATION, LTD.,
*Respondent.*

## RESPONDENT'S BRIEF

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## RESPONDENT'S BRIEF

### OPINIONS BELOW

The memorandum of the District Court for the District of Massachusetts upon the granting of the preliminary injunction (R. 117) is unreported. The opinion of the District Court upon the motion of the petitioners to dismiss the bill of complaint, which, as petitioners state, is not involved in this appeal, is reported in 15 F. Supp. 915 (R. 118). The opinion of the Circuit Court of Appeals for the First Circuit (R. 229) is reported in 88 F. (2d) 154 and the opinion of that Court (hereinafter called the Court of Appeals) denying the motion of the petitioners for leave to file a second petition for rehearing (R. 242) is reported in 89 F. (2d) 1000.

## QUESTIONS PRESENTED

The question involved is whether the District Court abused its discretion or violated any rule of equity in granting the preliminary injunction against the holding by the petitioners of a hearing (hereinafter called the scheduled hearing) for the purpose of determining whether or not the respondent has engaged at its Fore River Plant in any so-called "unfair labor practices" as defined in Section 8 of the Act hereinafter referred to.

## STATUTE AND REGULATIONS INVOLVED

The Act involved is the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449; U. S. C., Sup. II, Title 29, Sec. 151 *et seq.*) which appears in the record (pp. 17-27 of the pamphlet following R. 245). The rules and regulations of the National Labor Relations Board (hereinafter called the Labor Board) which accompanied its complaint likewise appear in the record as Exhibit A-2 to the bill of complaint (R. 35-36).

## STATEMENT

The respondent instituted this suit by filing a bill of complaint in equity for an injunction (and petition for a declaratory judgment) against the holding by the petitioners of the scheduled hearing upon a complaint issued by the Labor Board against the respondent, a copy of which is attached as Exhibit A-1 to the bill of complaint (R. 31), and prayed for a temporary injunction against

the holding of such hearing and the taking of any action with respect thereto (R. 25-29).

The prayer for a preliminary injunction was heard in the District Court on the sworn bill of complaint and affidavits, including those of various officials and employees of the respondent. It was stipulated in the District Court that the affidavits filed in the suit of *MacKenzie, et al.* v. *Myers, et al.* (No. 182, the record in which is printed with the record in No. 181) brought by employees of the respondent against the petitioners and heard with this suit in the District Court might also be considered in this suit (R. 112).

In the bill of complaint the respondent set forth the facts regarding the business conducted by it at the plant at which the Labor Board alleges that the respondent has been engaged in unfair labor practices (hereinafter called the Fore River Plant) and set forth the pertinent facts regarding its relations with its employees there. The Fore River Plant is the only plant involved in this suit.

The District Court, on the granting of the preliminary injunction, found all of the facts alleged in the bill of complaint (as distinguished from statements and conclusions of law) to be true (R. 111).

The Fore River Plant is a completely equipped plant for the designing and building of vessels of various kinds, sizes and descriptions, from small steel fishing trawlers to large freight and passenger steamers, transoceanic passenger liners and naval vessels of all descriptions (Bill, par. 7, R. 6; Aff. Gould, R. 88; Pratt, R. 100). It is located on Weymouth Fore River at Quincy and Braintree, Massachusetts (Bill, par. 6, R. 5; Aff. Gould, R. 87). The vessels built at the Fore River Plant are built entirely on specific

contract and are delivered to the purchasers thereof at the Fore River Plant* (Bill, pars. 7 and 8, R. 6-7). In carrying on its business of designing and building vessels at said plant, the respondent fabricates and shapes in its shops there especially for each vessel built by it at such plant practically all the materials used in the building of such vessels and also builds the boilers and main propelling machinery for each such vessel. The completed vessels bear no resemblance to the materials used in building them, and are of far greater value than such materials, the cost of such materials representing less than half of the cost of building such vessels, the increase in value being due to the manufacturing, fabricating and building operations performed by the respondent at said plant (Bill, par. 8, R. 7; Aff. Gould, R. 88-89). At the date of the bill of complaint herein about 5,000 men were employed at the Fore River Plant (Bill, par. 7, R. 6).

The bill of complaint alleges that neither the transaction of the business of the respondent at the Fore River Plant nor its relations with its employees with respect thereto constitute interstate or foreign commerce; that they do not directly affect such commerce; that they do not burden or obstruct such commerce, or the free flow thereof, or tend to lead to labor disputes burdening or obstructing such commerce, or the free flow thereof; that such transactions do not occur, or such relations exist, in the course or current of interstate or foreign commerce, nor are they

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*About 2.5% of the respondent's business at the Fore River Plant consists of manufacturing miscellaneous machine products on specific orders and performing certain metal processing operations. Such machine products and the materials processed are also delivered at the Fore River Plant to the purchasers thereof or to those for whom such materials have been processed (Bill, pars. 7-8, R. 6-7).

a part of the operations of instrumentalities of such commerce (Bill, par. 22, R. 21). The District Court has found the facts to be as so alleged (R. 111).

In March, 1923, the Plan of Employees' Representation, which is in effect at the Fore River Plant at the present time as it has been amended from time to time by the employees, was adopted. Such plan (hereinafter called the Plan) is operated entirely by the employees without any domination, interference, intimidation or coercion on the part of the respondent. Uncontradicted affidavits, both by officials of the respondent and by employees at the Fore River Plant, who are in a position to know, demonstrate the fact that the respondent has not dominated or interfered with its employees in any way at any time up to the time of the hearing in this suit (Bill, pars. 20-21, R. 19-20; Affs. Wakeman, R. 107-108; MacKenzie, R. 108, 167-168; McDermott, R. 108, 174-175).

Prior to March, 1923, when the Plan was adopted at the Fore River Plant, labor conditions had been bad. Particularly during the years from the period of the World War until the Plan went into effect, there were intermittent labor disputes and frequent strikes and walk-outs by groups of employees in various sections and departments of the Fore River Plant, with a result that the efficiency of the employees there was impaired and operations were interfered with and, in general, conditions were unsettled and operations impeded and the existence of pleasant and harmonious relations between the respondent and its employees was prevented (Aff. Gould, R. 90-91; MacKenzie, R. 108, 168; McDermott, R. 108, 173).

A very marked change took place in labor conditions among the employees at the Fore River Plant almost im-

mediately upon the adoption of the Plan and, in marked contrast to the conditions which existed at the Fore River Plant during the period just described above, there have been no labor disturbances or labor trouble of any nature whatsoever at the Fore River Plant since the adoption of the Plan. All questions concerning rates of pay, wages, hours of employment and other conditions of employment and all grievances and other questions of interest to employees have been expeditiously and satisfactorily settled from time to time through collective bargaining between the management and the Employees' Representatives elected for the purpose under the Plan by the employees at the Fore River Plant, voting in Nominations (primaries) and Elections by secret ballot. As a result of the operation of the Plan since 1923, in almost constantly increasing measure, there have existed and there now exist at the Fore River Plant pleasant, friendly and harmonious relations between the respondent and its employees (Bill, pars. 15, 19, R. 13, 17; Affs. Gould, R. 91; Hannabury, R. 108, 177, 178; Harvey, R. 171-172).

Such Employees' Representatives, who are elected for the purpose of representing the employees in collective bargaining, were elected by the votes of over 96% of the employees eligible under the Plan to vote and who were at the plant on the day of the election, and such employees represented practically all of the employees of the respondent at the Fore River Plant* (Bill, par. 21, R. 20).

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*The record shows that 96% or 97% and 97.2%, respectively, cast good ballots that were counted in March, 1935 and in March, 1936, respectively (Aff. Barker, R. 108, 179; Supp. Aff. Barker, R. 110, 188). The record does not, of course, show beyond 1936. It is a fact, however, that in March, 1937, 98% of the employees cast good ballots that were counted.

In 1934 and 1935, the predecessor of the Labor Board, in existence under Public Resolution 44—73rd Congress* (hereinafter called the Old Labor Board) conducted a proceeding instituted on the complaint of Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America, the complaining party upon whose charge the complaint before the Labor Board involved in this suit is based (Bill, par. 16, R. 13-14; Aff. Collins, R. 102-103). The proceeding on that complaint and the decision of the Old Labor Board thereon after lengthy hearings (hereinafter called the First Fore River Case) have an important bearing upon this suit, for in such proceeding the operation of the Plan then and now in effect at the Fore River Plant and the relations between the respondent and its employees there were described at length by witnesses and were thoroughly considered. The matters involved in the First Fore River Case included the matters that are charged in the complaint of the Labor Board involved in this suit (Bill, pars. 16, 18; R. 13, 16).

On February 13, 1935, or about 4½ months after the date of the first hearing in the First Fore River Case, the Old Labor Board unanimously decided that the respondent was not guilty of the charges made against it and refused to take the action against it which had been requested by Local 5 of the Industrial Union (Bill, par. 16, R. 14).

The out-of-pocket cost to the respondent in connection with the First Fore River Case was in excess of $15,000, and the hearings in such Case consumed a total of 2,500 hours of working time of employees, foremen and leading men, and also caused the loss of many more hours in connection with and in preparation for such hearings. Such

*Act of June 19, 1934, c. 677, 48 Stat. 1183.

hearings, similarly, caused a loss of time of important officials of the Fore River Plant, particularly the Vice-President of the respondent in charge of all of its plants and also the General Manager and Assistant General Manager of the Fore River Plant, who spent by far the greater part of the month of October, 1934, in connection with such hearings (Bill, par. 17; R. 14-16; Aff. Collins, R. 102-104).

The respondent also suffered damage (more serious, in fact, than that above described) as a result of such Case in the disturbance caused to its employees and apprehension which they manifested, which resulted in the lowering of their morale and gave rise to unsettled conditions among them which impaired the efficiency of the operations of the Fore River Plant and impeded operations there (Aff. Collins, R. 103; Supp. Aff. McDermott, R. 109, 185-186).

Subsequent to the date of the decision of the First Fore River Case and prior to the commencement of this suit, there was no change in the operation of the Plan, or in the policy of the respondent with respect thereto (Bill, par. 18; R. 16; Aff. Homer, R. 98-99).

The holding of the scheduled hearing and the taking of any further proceedings in connection therewith, regardless of the outcome thereof, will seriously interfere with the harmonious relations which exist between the respondent and its employees, and will cause a lowering of the efficiency of the employees at the Fore River Plant, and will result in great damage which cannot be accurately estimated (Bill, par. 19; R. 17-19).

These facts are established by affidavits showing that there had been disseminated among the employees of the respondent at the Fore River Plant and throughout the sur-

rounding communities much false propaganda, and it is the opinion of the General Manager of the Plant and of leading representatives of the employees that the holding of the scheduled hearing, and the taking of proceedings in connection therewith, will seriously damage the friendly, pleasant and harmonious relations between the respondent and its employees, and will seriously affect the morale of the employees (Aff. Gould, R. 91-93; MacKenzie, R. 108, 169; Harvey, R. 108, 172).

The order granting the preliminary injunction stated that it appeared

> "that the issuance of a preliminary injunction is necessary to prevent immediate and irreparable damage, for the reason that the holding of any hearing for the purpose of determining whether or not the plaintiff [the Shipbuilding Corporation] has engaged at its Fore River Plant in any so-called 'unfair labor practices' under the National Labor Relations Act, or taking any action with respect thereto, would involve expense to the plaintiff which it could not recover, absence of its officials and employees from their work, which would interfere with the operation of the plaintiff's Fore River Plant, and disturbance of harmonious relations with its employees" (R. 113).

Similarly, one of the conclusions of law of the District Court upon the granting of the preliminary injunction was that

> "The plaintiff [the Shipbuilding Corporation] will suffer irreparable damage of the kinds alleged in its bill of complaint if any hearing is held" (R. 112).

Such order granting the preliminary injunction also stated that

> "immediate, continual and irreparable loss and damage to the plaintiff [the Shipbuilding Corporation] will result unless a preliminary injunction is granted"

and that it did not appear that the respondent had

> "a plain, adequate and complete remedy at law" (R. 113),

and one of the conclusions of law was to the same effect (R. 112).

Furthermore, in its opinion on the motion of the petitioners to dismiss the bill of complaint (which was denied), which opinion was delivered after the case had been thoroughly briefed, the District Court said

> "The danger threatened is immediate and great" (R. 123).

The Court of Appeals unanimously affirmed the District Court, and in its opinion, after quoting the description of the business of the respondent in the complaint of the Labor Board, said

> "The employees of such a business are not engaged in interstate commerce nor in a business within the jurisdiction of the Board and, if not, the Board is acting without authority and in violation of law" (R. 231-232).

The Court of Appeals then went on to say:

> "On the somewhat unusual facts in this case, *viz.*, the long established plant association and the long established amicable and satisfactory relations

between the plaintiff and its employees fostered by it, it might well be held that irreparable injury would be caused by an investigation calculated to disturb those relations and that neither plaintiff [the Shipbuilding Corporation and the employee plaintiffs in No. 182] had an adequate remedy at law. Both the Shipbuilding Company and its employees have a right that the established friendly relations between them shall not be injured without legal justification. It cannot be said that the District Judge erred in finding and ruling that the plaintiffs had no adequate remedy at law or in finding and holding that danger of irreparable injury was shown and that, considering the doubt as to the Board's jurisdiction, the plaintiffs were entitled to preliminary injunctions" (R. 232).

On April 12, 1937, after that decision of the Court of Appeals, this Court handed down its opinions in the five cases involving the Act, and thereafter the petitioners filed a motion for leave to file a second petition for rehearing, a first petition having already been denied prior to such decisions of this Court. In denying such motion for leave to file the second petition for rehearing the Court of Appeals said:

"It is obvious that the business here in question as described in the finding of the District Judge is very different in character from the 'far-flung' enterprises of the Jones & Laughlin Steel Corporation, or from the essentially interstate businesses involved in *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.* and *National Labor Relations Co.* [*sic.*] v. *Fruehauf Trailer Co.* In applying the test laid down in the Jones & Laughlin opinion to individual business organizations some uncertainty as to which are under federal control

in their relations with their employees and which under state control will at first be unavoidable. When the question is raised, as in this case, we think it devolves on the National Labor Relations Board to show that the business involved is probably within its jurisdiction. *On the findings of the District Judge that fact is not established in the present case.* We think the case should stand for final hearing in the District Court" (Italics ours; R. 243).

## SUMMARY OF ARGUMENT.

I. The Labor Board does not have jurisdiction over the relations between the respondent and its employees at the Fore River Plant, because the operations conducted by the respondent at said Plant are not carried on, and the products manufactured at said Plant are not sold by the respondent, in interstate or foreign commerce and the relations of the respondent with its employees at said Plant, whatever they may be, cannot obstruct or burden, or tend to obstruct or burden, such commerce and the interruption of the operations of the respondent at said Plant would not directly affect, obstruct or burden such commerce.

II. The District Court had jurisdiction to entertain this suit and to grant a temporary injunction.

1. Jurisdiction to determine the constituitonal question whether the respondent is subject to the provisions of the Act is reposed in the courts and cannot be circumvented by statutory enactment.

2. The Act does not purport to take from the District Court equitable jurisdiction to prevent irre-

parable damage that would result from the holding of hearings by the Labor Board.

3. The respondent would suffer irreparable injury from the holding by the Labor Board of the scheduled hearing, not only by reason of the direct cost to the respondent and the loss of time of its officials and employees which would result from the holding of the scheduled hearing and the actions of the petitioners in connection therewith, but also by reason of the serious injury to the good-will and harmonious relations that have heretofore existed and now exist between the respondent and its employees at the Fore River Plant and the consequent serious impairment of the efficiency of operations at said Plant that would inevitably result from the holding of the scheduled hearing.

4. The respondent has no timely, plain, adequate or complete remedy at law.

III. No proper ground exists for reversing the order granting a preliminary injunction.

1. The Court should not disturb a preliminary injunction, except for improvident allowance, violation of the rules of equity or abuse of discretion.

2. A preliminary injunction should not be disturbed by the Court where irreparable injury to the plaintiff may ensue and the continuance in effect of the injunction cannot seriously harm the defendant, unless it is clear from the record that there is no equity in the bill of complaint.

## ARGUMENT

### I

### THE LABOR BOARD DOES NOT HAVE JURISDICTION OVER THE RELATIONS BETWEEN THE RESPONDENT AND ITS EMPLOYEES AT THE FORE RIVER PLANT.

As has been hereinbefore stated, the respondent's business at the Fore River Plant is a local business operated entirely within the State of Massachusetts. The employees employed therein are engaged solely in intrastate activities. The respondent does not ship any of its products in interstate or foreign commerce, but delivers all of them to purchasers at the Fore River Plant. Its business is not in interstate or foreign commerce and neither its operations nor its relations with its employees can directly affect such commerce. Hence neither of them is within the power of regulation granted by the Commerce Clause.

In a long line of decisions this Court has held that production is not commerce and is not within the power of Congress to regulate. *Kidd* v. *Pearson,* 128 U. S. 1; *United States* v. *Knight Company,* 156 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584;

*Schechter Corporation* v. *United States*, 295 U. S. 495; *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

In *Kidd* v. *Pearson*, at 128 U. S. 1, *supra*, it was contended that a statute of Iowa prohibiting the manufacture of intoxicating liquors and construed by the highest court of that state as prohibiting such manufacture for the purpose of interstate transportation, as well as for local consumption, was unconstitutional as an unwarranted interference with interstate commerce. This Court held that the Commerce Clause did not empower Congress to regulate the production of articles intended for shipment in interstate commerce, and that consequently the state act was not in contravention of that Clause. The reasons for that conclusion were stated, in part, as follows (pp. 20-21):

> "Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. * * * If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. * * * The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would de-

> volve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be, local in all the details of their successful management."

In *United States* v. *Knight Company*, 156 U. S. 1, *supra*, the Court again distinguished production and commerce, and said (p. 12):

> "Commerce succeeds to manufacture, and is not a part of it."

In that case the Court also said (p. 16) that if regulation of commerce extended to the regulation of "productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control."

In the first *Coronado* case (*United Mine Workers* v. *Coronado Coal Company*, 259 U. S. 344, *supra*), the Court said (p. 407):

> "Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In *Hammer* v. *Dagenhart*, 247 U. S. 251, 272 we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterward shipped or used in inter state commerce, make their production a part thereof. *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439'. Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, *although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.*" (Italics ours.)

In *Heisler* v. *Thomas Colliery Company*, 260 U. S. 245, the Court stated that a conception of the Commerce Clause that would bring within it the regulation of production

> "* * * would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other States, at the very inception of their production and growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof', wool yet unshorn, and coal yet unmined, because they are, in varying percentages destined for and surely to be exported to States other than those of their production." (pp. 259-260)

While the cases above cited other than the *Schechter* case and the *Carter Coal Company* case involved primarily the interpretation and application of the Sherman Act, the Court in its opinion in the *Schechter* case made it plain that the test is the same in respect of the extent of constitutional power.

In *Schechter Corporation* v. *United States*, 295 U. S. 495, the Court said concerning the contention made in that case that the petitioner's business of buying poultry that had been shipped in interstate commerce for slaughtering and for sale within the State of New York only was in the "current" or "flow" of interstate commerce (p. 543):

> "* * * The mere fact that there may be a constant flow of commodities into a State does not mean that the flow continues after the property has arrived and has become commingled with the mass of property within the state and is there held solely for local

disposition and use. So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State. It was not held, used, or sold by defendants in relation to any further transactions in interstate commerce and was not destined for transportation to other states. Hence, decisions which deal with a stream of interstate commerce—where goods come to rest within a State temporarily and are later to go forward in interstate commerce—and with the regulations of transactions involved in that practical continuity of movement, are not applicable here [citing cases]."

In the *Schechter* case the Court said further (p. 546):

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would

embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control."

And at page 549:

"* * * If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power."

And at page 550:

"* * * But the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. * * *"

In *Carter* v. *Carter Coal Company,* 298 U. S. 238, *supra,* the Court said (pp. 303-4):

"* * * One who produces or manufactures a commodity, subsequently sold and shipped by him in interstate commeroe, whether such sale and shipment were originally intended or not, has engaged

in two distinct and separate activities. So far as he produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government. *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165, 182. Production is not commerce; but a step in preparation for commerce. *Chassaniol* v. *Greenwood,* 291 U. S. 584, 587.

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. *The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things —whether carried on separately or collectively— each and all constitute intercourse for the purposes of production, not of trade.* The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it. (Italics ours.)

"A consideration of the foregoing, and of many cases which might be added to those already cited, renders inescapable the conclusion that the effect of the labor provisions of the act, including those in respect of minimum wages, wage agreements, col-

lective bargaining, and the Labor Board and its powers, primarily falls upon production and not upon commerce; and confirms the further resulting conclusion that production is a purely local activity. It follows that none of these essential antecedents of production constitutes a transaction in or forms any part of interstate commerce. *Schechter Corp.* v. *United States, supra,* p. 542 *et seq.* Everything which moves in interstate commerce has had a local origin. Without local production somewhere, interstate commerce, as now carried on, would practically disappear. Nevertheless, the local character of mining, of manufacturing and of crop growing is a fact, and remains a fact, whatever may be done with the products."

Again, at page 308, the Court said:

"Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is *greatly* affected thereby. But, in addition to what has just been said, the conclusive answer is that the evils are all local evils over which the federal government has no legislative control. The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local

> controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

After referring to the decision in the *Schechter* case, the Court continued (p. 310):

> "A reading of the entire opinion makes clear, what we now declare, that the want of power on the part of the federal government is the same whether the wages, hours of service, and working conditions, and the bargaining about them, are related to production before interstate commerce has begun, or to sale and distribution after it has ended."

The Act itself purports to forbid only unfair labor practices "affecting commerce" (Section 10) and defines the term "affecting commerce" as meaning "in commerce or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce" (Section 2 (7)). In *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, and the other cases involving the Act that were decided at the same time as that case (*National Labor Relations Board* v. *Freuhauf Trailer Company,* 301 U. S. 49; *National Labor Relations Board* v. *Friedman-Harry Marks Clothing Co.,* 301 U. S. 58), the Court expressly recognized that the grant of authority to the Labor Board under the Act "does not purport to extend to the relationship between all industrial employees and employers" and that the Act does not "impose collective bargaining upon all

industry regardless of effects upon interstate or foreign commerce", but that it "purports to reach only what may be deemed to burden or obstruct that commerce" and that, as thus qualified, "it must be construed as contemplating the exercise of control within constitutional bounds" (301 U. S. 1, 31).

In those cases the Court held that the provisions of the Act which forbid interference by an employer with the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection as applied to the particular industries then before the Court were within the power of Congress, under the Commerce Clause. The industries considered in those cases were shown to be extensively engaged in interstate commerce both in the receipt of their raw materials and in the sale and distribution of their products. In the principal case (the *Jones & Laughlin Steel Corporation* case) the respondent was found to be the fourth largest producer of steel in the United States and the court reviewed and commented on its "far flung activities" in interstate commerce. The respondents in the others of such cases, while not comparable in size and in the extent of their interstate activities with the steel company, were likewise shown to be both dependent for their raw materials on, and extensively engaged in the distribution of their products in, interstate commerce. On the facts in those cases the majority of the Court was of the opinion that it was within the power of Congress to protect the interstate and foreign commerce there involved by appropriate means against obstruction and injury that might result from labor disturbances and the stopping of the operations of the respondents in consequence thereof.

In the majority opinion care was taken to limit the application of the decisions to the facts of the particular cases then under consideration. The challenge of the Act as an attempt to regulate all industry, thus invading the reserved powers of the states over their local concerns, was referred to and the Court in the majority opinion said:

> "If this conception of terms, intent and consequent inseparability were sound, the Act would necessarily fall by reason of the limitation upon the federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495, 549, 550, 554. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *Id.*" (pp. 29-30).

Again, with reference to the definition in the Act of the term "affecting commerce", it was said:

> "This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds" (p. 31).

And again, with reference to the power to protect commerce from burdens and obstructions, and with citation of the *Schechter* case*, it was said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *Id.* The question is necessarily one of degree" (p. 37).

The decisions in the *Jones & Laughlin* case and its companion cases are clearly not applicable to the facts in this case. As has been hereinbefore shown, the District Court in this case has found the facts to be, as alleged in paragraph 22 of the Bill, that the business of the respondent at the Fore River Plant does not constitute interstate commerce and that its relations with its employees with respect thereto do not tend to lead to labor disputes burdening or obstructing such commerce or the free flow thereof (R. 111; Bill, pars. 6, 7, 8, 22; R. 5, 6, 7, 21). The Court of Appeals, by its affirmance of the order of the District Court granting the temporary injunction as well as in its opinion denying the petitioners' motion for leave to file a second petition for rehearing (R. 243), has concurred in those findings.

It is the established rule of this Court that the Court accepts findings in which two courts have concurred, unless clear error is shown. *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 558; *Stuart* v. *Hayden,* 169 U. S.

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**Schechter Corporation* v. *United States,* 295 U. S. 495.

1, 14; *Texas & Pacific Railway Co.* v. *Railroad Commission,* 232 U. S. 338; *Washington Securities Company* v. *United States,* 234 U. S. 76, 78; *Bodkin* v. *Edwards,* 255 U. S. 221, 223.

No such error can be shown in this case. It clearly appears from the facts as set forth in the bill and the affidavits filed on behalf of the respondent in this case that the business of the respondent at the Fore River Plant is not carried on in interstate or foreign commerce; that the products manufactured at that plant are not sold in interstate or foreign commerce; that the relations of the respondent with its employees at the Fore River Plant do not obstruct or burden, or tend to obstruct or burden, interstate or foreign commerce; and that the interruption of the operations of the respondent at the Fore River Plant would not directly affect, obstruct or burden interstate or foreign commerce. In the absence of any evidence in the record to the contrary, the District Court was warranted in accepting the facts as set forth in the bill of complaint and in such affidavits and its findings with regard thereto are fully justified.

It is submitted, therefore, that the operations of the respondent at the Fore River Plant and its relations with its employees there are not subject to regulation by Congress under the Commerce Clause and are not within the jurisdiction of the Labor Board under the Act. Any other conclusion would mean that all industry and the relations of all employers with their employees would be subject to such regulation under the Act. For instance, any other conclusion would mean that the relations between an employer engaged in the construction of a building in the City of Boston and his employees might be subject to regulation under the Act.

## II

## THE DISTRICT COURT HAD JURISDICTION TO ENTERTAIN THIS SUIT AND TO GRANT THE PRELIMINARY INJUNCTION.

### 1. Jurisdiction to Determine the Constitutional Question Whether the Respondent Is Subject to the Provisions of the Act Is Reposed in the Courts and Cannot Be Circumvented by Statutory Enactment.

This is apparent from numerous decisions of this Court, such as *Crowell* v. *Benson,* 285 U. S. 22; *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38; *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Bluefield Co.* v. *Public Service Commission,* 262 U. S. 679, 683; *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *State Commission* v. *Wichita Gas Co.,* 290 U. S. 561, 569.

*Crowell* v. *Benson, supra,* was a suit to enjoin the enforcement of an award for personal injury made under The Longshoremen's and Harbor Workers' Compensation Act.* The statute was enacted under the admiralty and maritime jurisdiction of Congress. The application of the statute was conditioned on two fundamental limitations: (1) that the injury took place on navigable water, and (2) that the relation of employee and employer existed. The Court held that the determination of fundamental and jurisdictional facts upon which constitutional rights depend is a matter for the judicial and not the administrative side of the Government. The Court said (pp. 60, 64):

> "In cases brought to enforce constitutional rights, the judicial power of the United States

*Act of March 4, 1927, c. 509, 44 Stat. 1424; U. S. C. Title 33 §§ 901-950.

necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

* * * * * * *

"As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it."

*St. Joseph Stock Yards Co.* v. *United States, supra,* was a suit to enjoin enforcement of rates fixed by the Secretary of Agriculture under the Packers and Stockyards Act, 1921,* authorizing the Secretary of Agriculture to prescribe maximum charges for the services of stock yards. Concerning the right of judicial determination of the facts and the law upon which the constitutional question of deprivation of property without due process, or taking of property for public use without just compensation, depend the Court said (pp. 51-52):

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*42 Stat. 159, 7 U. S. C. §§ 181-229.

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards."

* * * * * * *

"The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

In *State Commission* v. *Wichita Gas Co., supra,* a suit to enjoin the State Corporation Commission of Kansas from enforcing orders which were challenged as repugnant to the Federal Constitution, the Court said (p. 569):

> "The appellees were not obliged preliminarily to institute any action or proceeding in the Kansas court in order to obtain in a federal court relief from an order of the commission on the ground that it is repugnant to the Federal Constitution. *Bacon* v. *Rutland R. Co.,* 232 U. S. 134, 138. *Missouri* v. *Chicago, B. & Q. R. Co.,* 241 U. S. 533, 542. *Ex parte Young,* 209 U. S. 123, 166. And upon the issue of confiscation *vel non* they are entitled to the independent judgment of the courts as to both law and facts. *Ohio Valley Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289. *Bluefield Co.* v. *Pub. Serv. Comm'n,* 262 U. S. 679, 689. *United Railways* v. *West,* 280 U. S. 234, 251."

**2. The Act Does Not Purport to Take from the District Court Equity Jurisdiction to Prevent Irreparable Damage That Would Result from the Holding of Hearings by the Labor Board.**

In their brief the petitioners assert that the Act vests exclusive jurisdiction in the Board and in the Circuit Courts of Appeals, and argue that the language of the Act itself deprives the District Courts of their ordinary equity power as applied to proceedings before the Board.

If the Act did so provide, it would be unconstitutional as depriving parties in the position of the respondent here of property without due process of law in violation of their rights under the Fifth Amendment. This appears

from the authorities cited under Point II. 1, *supra.* See also *Truax* v. *Corrigan,* 257 U. S. 312.

It is clear, however, that the Act does not purport to deprive the District Courts of the equity jurisdiction which they would otherwise have.

The provision in Section 10(a) of the Act to which the petitioner's brief refers gives the Board power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce," and then states:

> "* * * This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law or otherwise."

Obviously, the power which this paragraph states shall be exclusive is the power of the Board to prevent unfair labor practices; it has no bearing whatsoever upon the power of the District Courts to enjoin the Board from holding hearings.

The brief of the petitioner also points out that Section 10(e), which gives the Circuit Courts of Appeals power to enforce orders of the Board, provides: "The jurisdiction of the court shall be exclusive." This obviously refers only to the power to enforce orders of the Board.

The brief of the petitioner also relies upon Section 10(f). That section provides that any person aggrieved by a final order of the Board may obtain review of such order in a Circuit Court of Appeals, by filing a written petition praying that the order of the Board be modified or set aside. That section contains the following language:

> "Upon such filing, the court shall proceed in the same manner as in the case of an application by

> the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive."

Although this language is somewhat ambiguous, it seems perfectly clear that the only exclusive jurisdiction which is given to the Circuit Courts of Appeals by that section is to grant the Board temporary relief or a restraining order and, it would seem, also to modify or set aside in whole or in part the order of the Board. Clearly, it does not purport to touch the question as to whether there can be any injunction against the Board's proceeding before the Board has made an order.

**3. The Respondent Would Suffer Irreparable Injury from the Holding by the Labor Board of the Scheduled Hearing.**

The holding by the petitioners of the scheduled hearing and the doing of other things which the petitioners will be bound to do in connection with such hearing would inflict irreparable injury upon the respondent. In order that the extent of such injury may be understood, a consideration of the provisions of the Act and of the procedure to be anticipated under it is necessary.

**A. An Outline of the Provisions of the Act Relating to the Scheduled Hearing and the Things That Will Be Done in Connection Therewith.**

The Labor Board in its complaint against the respondent has charged certain violations of the Act. Pursuant to the notice attached to such complaint, the petitioners were about to proceed with the holding of a hearing thereon when they were enjoined therefrom by the restraining order and preliminary injunction herein. If the scheduled hearing shall be held, it must be anticipated that the petitioners, as agents of the Labor Board, will endeavor by every means in the conduct of such hearing to establish the charges made in such complaint and to that end will exercise all the powers which the Act and the rules and regulations of the Labor Board (R., pamphlet following p. 245) purport to confer upon them for the carrying out of the provisions of the Act. To that end it will be necessary for the petitioners to call witnesses in order to show fully the business of the respondent and its operations therein and its relations with its employees and the relations of the employees among themselves, particularly in the operation of their Plan of Employees' Representation and the relation of the respondent to it. In fact, at the time when the first restraining order herein was made the Labor Board had already issued subpoenas requiring the attendance of six witnesses in the employ of the respondent and the production of voluminous records (R. pp. 95, 105, 109, 110; Findings, R. 111). In order to defend against the charges made in the complaint officials and employees of the respondent would be required to devote a great deal of time to the hearings as well as in the preparation therefor.

Moreover, the Act (Section 11 (1)) purports to grant to the Labor Board and its agents and agencies, including the petitioners, the right at all reasonable times to "have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question". Since the Labor Board has issued its complaint against the respondent, that section purports to give to the Board, or to any of its agents or agencies, including the petitioners, the power to enter upon a fishing expedition of a most unlimited nature by examining all the papers, documents and private and confidential files of the respondent. Even though nothing therein contained may turn out to be relevant to the issues involved in such complaint, the petitioners may examine all the records of the respondent which they shall deem pertinent to their hearing, no matter how confidential such records may be and how great may be the damage that would result to the respondent from the disclosure of the information gathered by the petitioners therefrom.

**B. The Adverse Effect upon the Business and Rights of the Respondent of the Scheduled Hearing and Action and Proceedings in Connection Therewith.**

As hereinbefore stated (pp. 4-5) the business of the respondent at the Fore River Plant is almost entirely (all except 2½%) that of building vessels of all kinds. The Fore River Plant is necessarily a large and well equipped ship building plant and one in which the respondent has a large investment. As also hereinbefore stated, at the time of the filing of the bill of complaint herein, it had approximately 5,000 employees there.

If the scheduled hearing shall be held, the loss in respect of services of officers and employees will by no means be confined to those who shall give testimony at such hearing or give time and attention to the preparation therefor. The effect that such a proceeding would have upon the great body of employees at the Fore River Plant would involve very much greater damage to the respondent.

To the great body of employees the complaint of the Labor Board is a charge that the respondent has violated the Act to their detriment. Whatever may otherwise be their feeling towards the respondent, when it comes to a question between the respondent and their Government and law, they are sure to feel that the respondent is guilty of wrong, and, in so far as they shall take sides at all, they will take sides against the respondent. The result would be that the good will and harmonious relations that have heretofore existed and now exist between the respondent and its employees at the Fore River Plant would be seriously disturbed, and friction and even ill will against the respondent would be developed. That being the case, not only would damage be caused to the respondent in loss of time of its officers and employees from attendance at the scheduled hearings and in preparing the defense against the charge contained in the Labor Board's complaint, but the efficiency of the entire body of employees would be cut down and services that would otherwise be rendered to the respondent would be lessened (Bill pars. 12, 19; R. 9, 17; Aff. Gould, R. 91-93).

Moreover such a hearing and proceedings attendant thereon would have an adverse effect upon the general public and the good will of the general public, particularly of those with whom the respondent does business, would be affected thereby (Bill par. 12; R. 9).

The extent of the injury that will result to the respondent, if the petitioners shall be allowed to proceed with the scheduled hearing, is evidenced by the prior experience of a similar hearing that the respondent had at the Fore River Plant. In October, 1934, the National Labor Relations Board which was constituted under Public Resolution No. 44—73d Congress* (hereinafter called the Old Labor Board) conducted hearings at Boston on the complaint made by Local No. 5 of the Industrial Union of Marine and Shipbuilding Workers of America, which is the organization upon whose charges the present complaint is based. The hearings and proceedings of the Old Labor Board on such complaint in 1934 are hereinafter sometimes referred to as the First Fore River Case.

Such hearings began on October 1, 1934, and extended throughout that entire month from time to time, many of such hearings continuing until late into the evening. The last of such hearings was held on October 31, 1934. A transcript of the record in such case (including approximately 100 pages of arguments of such case at Washington before the Old Labor Board) covered approximately 1550 typewritten pages. Such hearings and the work which it was necessary to do in connection therewith and in preparation therefor placed a very substantial burden upon the respondent and constituted a real obstacle to the efficient operation of the Fore River Plant at that time (Bill, par. 17, R. 14; Aff. Collins, R. 102-104). Twenty-eight employees and officers of the respondent were called as witnesses in that case, and in addition thereto, a number of foremen and leading men employed at the Fore River Plant,

*See footnote, page 7.

as well as other employees, were required from time to time to be in attendance at such hearings (Aff. Collins, R. 102).

As a result of that proceeding and the reaction caused by it among the employees at the Fore River plant, there was a general let-down in the morale of such employees (Aff. Collins, R. 103).

As a result of the above mentioned attendance at such hearings a total of not less than 2,500 working hours of employees at the Fore River Plant were spent at such hearings and, in addition thereto, a great many working hours were spent by foremen and leading men in connection with and in preparation for such hearings. None of such hours were productive of anything. Moreover, much valuable time of various officials of the respondent charged with the supervision of the operation of the Fore River Plant, including in the case of some of them the greater part of the month of October, 1934, was spent at and in connection with such hearings and in assisting counsel for the respondent in the defense thereof to the neglect of important matters in connection with the operation of such plant (Bill, par. 17, R. 14; Aff. Collins, R. 103-104). Their time was lost to the respondent and its business thereby suffered.

After argument of the First Fore River Case before the Old Labor Board at Washington, that Board on February 13, 1935, dismissed the charges made therein. However, serious injury had been done to the respondent by the pendency of that case. The loss of time of its employees and the loss of their efficiency in its work had been suffered and a substantial amount of money (more than $15,000) was spent by the respondent in defending itself against the charges wrongfully made against it in that case (Bill, par. 17, R. 14; Aff. Collins, R. 104).

Since the adoption of the Plan of Employees' Representation in March, 1923, there have been no labor disputes or labor trouble of any nature whatsoever at the Fore River Plant. Friendly and harmonious relations have existed there between the respondent and its employees (Aff. Gould, R. 91; Hannabury, R. 108, 176; Harvey, R. 108, 171). The continuance of such relations has a distinct property value to the respondent as well as to its employees and the interruption thereof as a result of the holding of the scheduled hearing would result in loss and damage to them both.

In addition to the elements of injury above described the bill of complaint alleges that, to disprove the charge brought, "it will be necessary that it [the respondent] incur great expense for counsel fees, for fees of its witnesses, and for traveling and other expenses, all of which are irrecoverable", and that these things "will interfere with, interrupt and cause damage to the business of the plaintiff at said plant" (Bill, par. 13, R. 10).

As stated above, the District Court found all the facts alleged in the bill of complaint to be true (R. 111).

The petitioner's brief contends that the allegations of irreparable injury which we make "consist only of general assertions, entirely speculative in character, which are not sufficient to support the far-fetched claims of irreparable injury based upon them". That contention is without fundation. The apprehension which the respondent entertains is not based upon mere imagination. The actual occurrences in the First Fore River Case are a clear indication of what will inevitably happen if another similar hearing is held. The persons who are in the best position to know about the effect of such a hearing on the employees and their efficiency all agree that it will be serious and will result in great loss (see affidavits of Gould, R. 92-93; Collins, R. 102-103; MacKenzie, R. 109, 169-170; McDermott, R. 109, 174).

The District Court has not only found generally that the allegations of the bill are true, but has specifically stated that "it appears that the plaintiff will suffer irreparable damage of the kinds alleged in the bill of complaint if any hearing is held * * * or if any proceedings or action whatsoever is taken with respect thereto". (R. 112). See also the extracts from the order granting preliminary injunction and other statements of the District Court and the Circuit Court of Appeals quoted on pages 9-11, *supra*.

If the hearing stayed by the temporary injunction herein shall be permitted to proceed, the threatened injury and loss to the respondent as a result thereof will be inflicted on it, even though it shall ultimately be determined that the business of the respondent and its relations with its employees at the Fore River Plant are not subject to the provisions of the Act (Point I above). That the situation thus presented by the Labor Board's complaint and the scheduled hearing thereon is one in which the equity jurisdiction of the District Court may properly be invoked is established by the decisions of the Court. *Watson* v. *Sutherland*, 5 Wall. 74 (1866); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Walla Walla* v. *Walla Walla Water Company*, 172 U. S. 1 (1898); *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 82 (1902); *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 248 (1917); *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 592, 593 (1923); *City Bank Farmers Trust Company* v. *Schnader*, 291 U. S. 24, 34 (1934).

For instances in which the courts have recognized as irreparable damage cognizable in equity interferences with employment relationships fundamentally the same as those

being attempted by the petitioners and the Labor Board herein and in which it has been held that "if the unconstitutionality of the Act pursuant to which such interferences are attempted" is shown, "equitable relief may be had",* see *Truax* v. *Raich,* 239 U. S. 33 (1915); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918). See also *Terrace* v. *Thompson,* 263 U. S. 197, 215, 216 (1923); *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 386 (1926).

In *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229, *supra,* this Court said concerning the pecuniary value to an employer of the good-will of his employees (p. 252):

> "In short, plaintiff was and is entitled to the good-will of its employees, precisely as a merchant is entitled to the good will of his customers although they are under no obligation to continue to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees, and paying them fair wages, and avoiding reasonable grounds for complaint, it will be able to retain them in its employ, and to fill vacancies occurring from time to time by the employment of other men on the same terms. *The pecuniary value of such reasonable probabilities is incalculably great, and is recognized by the law in a variety of relations.*" (Italics ours.)

The Court said further (p. 256):

> "Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

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**Truax* v. *Raich, supra,* at page 39 of 239 U. S. As we have shown in Point I above, the application of the Act to the respondent as attempted in the complaint of the Labor Board in this case is beyond the constitutional power of Congress.

In the brief of the petitioners *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 280 Fed. 45, is cited as authority for the contention that injury resulting from the holding of hearings by an administrative body is not such injury as will warrant intervention by a court of equity. That case did not involve an application to a court of equity for an injunction. It arose on an original petition to the Circuit Court of Appeals for a writ of certiorari to review certain interlocutory orders of the Federal Trade Commission on the ground, among others, that the statute under which the Commission proceeded was unconstitutional. Writ of certiorari was denied on the ground that the Circuit Court of Appeals was without jurisdiction to issue the writ as original process. That case did not involve any question as to the equity powers of the court. The language of the Court in that case upon which the petitioners rely is purely dictum and the decision in that case is not authority for the contention in support of which it is cited in the petitioners' brief, namely, that the injury alleged in the bill is not such as to justify intervention by a court of equity.

**4. The Respondent Has No Timely, Plain, Adequate or Complete Remedy at Law.**

In order that a remedy at law may be such as to oust equity of jurisdiction it must be as certain, effective, timely and complete as that which equity can give, and must be open to the party demanding relief to seek at his own choice and not at the will of the opposing party. As this Court said in *Terrace* v. *Thompson,* 263 U. S. 197, *supra* (p. 214):

> "* * * That a suit in equity does not lie where there is a plain, adequate and complete remedy at law is so well understood as not to require the citation of authorities. *But the legal remedy must be as complete, practical and efficient as that which equity could afford.*" (Italics ours.)

In *Boyce* v. *Grundy*, 3 Peters 210 (1830), Mr. Justice Johnson, in speaking of the adequacy of the remedy at law, said (p. 215):

> "* * * it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity."

That statement has been referred to with approval by this Court in numerous cases.

In *Kilbourn* v. *Sunderland*, 130 U. S. 505 (1889), Mr. Chief Justice Fuller said (pp. 514-515):

> "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

In *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, *supra*, this Court said (p. 12):

> "Where irreparable injury is threatened, or the damage be of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."

See also *Davis* v. *Wakelee*, 156 U. S. 680, 688 (1895); *Ex Parte Young*, 209 U. S. 123 (1908); *Hitchman Coal*

*& Coke Co.* v. *Mitchell,* 245 U. S. 229, *supra; Union Pacific R. R. Co.* v. *Weld County,* 247 U. S. 282, 287 (1918); *Wallace* v. *Hines,* 253 U. S. 66, 68 (1920); *Dawson* v. *Kentucky Distilleries & Warehouse Co.,* 255 U. S. 288, 296 (1921); *Smyth* v. *Ames,* 169 U. S. 466 (1898); *Bank* v. *Stone,* 88 Fed. 383 (C. C., D. Ky., 1898); *Wheeler* v. *Bedford,* 54 Conn. 244, 7 Atl. 22 (1886).

No remedy whatever, other than that of injunction as sought in this case, is open to the respondent for the loss and injury that it will suffer from the prosecution of the proceeding begun upon the complaint of the Labor Board in this case and the holding of the scheduled hearing thereon. Not one element of such loss and damage will be recoverable at law. The only remedy open to the respondent under the Act is that of defending against a petition by the Labor Board, as provided in Section 10(e), to a Circuit Court of Appeals (or a District Court if the Circuit Courts of Appeals are in vacation) for the enforcement of the Labor Board's order, or by petitioning a Circuit Court of Appeals, as provided in Section 10(f), to modify or set aside such order. The respondent cannot have relief by either such procedure until after the Labor Board shall have completed the hearing on its complaint and made its order thereon. Long before that time arrives substantially all the injury that will result to the respondent because of the proceeding will have been suffered and for such injury there will be no remedy, notwithstanding that the court shall determine that the proceeding was without warrant or justification and not within the constitutional limits of the powers conferred by the Act upon the Labor Board.

Moreover, the statutory remedy provided in the Act is inadequate because it fails to provide for or permit inde-

pendent judicial determination of fundamental or jurisdictional facts upon which the constitutional right of the respondent to be immune from the provisions of the Act depends. *Crowell* v. *Benson,* 285 U. S. 22, *supra.*

As stated above, that case arose under the Longshoremen's and Harbor Workers' Compensation Act*. The employer sued in the District Court to enjoin the enforcement of an award made, in reliance on that Act, by a Deputy Commissioner of the United States Employees' Compensation Commission in favor of an employee against such employer. Although the facts had been found by such Deputy Commissioner pursuant to the provisions of that statute, the trial court allowed a trial *de novo* upon the jurisdictional facts. The contention of the defense was that the findings of such Deputy Commissioner as provided in such statute were conclusive as to all facts and were binding upon the court. The Supreme Court distinguished between facts which may properly be intrusted by Congress to the determination of an administrative board and questions of fact of a jurisdictional or fundamental nature upon the establishment of which rests the power of Congress to legislate in the particular field under consideration. In that connection this Court said (at pp. 54-55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occur upon the navigable waters of

*See footnote, p. 28.

the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."

And again (at p. 56):

"In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. *It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies* for the investigation and finding of facts within their proper province, and the support of their authorized action, *does not require the conclusion* that there is no limitation of their use, and that *the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system,* wherever fundamental rights

> depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." (Italics ours.)

The Court then reviewed the various instances in which the right to find such jurisdictional facts has been denied to an administrative agency and then said (at p. 60):

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to *the independent determination of all questions, both of fact and law,* necessary to the performance of that supreme function." (Italics ours.)

This Court then went on to hold that, if the statute there involved were construed so as to deny to the District Court the right to determine *de novo* the jurisdictional facts, it would be unconstitutional. Accordingly, this Court held that the trial court had been correct in granting a trial *de novo.*

In the Act it is provided that the Labor Board shall find facts, which include the jurisdictional or fundamental facts, and that in a court to which the findings of such Board are referred they shall be conclusive, if supported by evidence (Sec. 10(e)). In this connection it should be borne in mind that in proceedings before the Labor Board "the rules of evidence prevailing in courts of law or equity shall not be controlling" (Section 10(b) of the Act). Presumably a Circuit Court of Appeals would be required to sustain the findings of the Labor Board, even if they be supported only by hearsay evidence. At any rate, under the Act the Labor Board itself assumes to find the jurisdictional or fundamental facts upon which it

bases its own jurisdiction and under that provision of the Act those facts as found are conclusive upon the court, if they are supported by evidence. *The court itself is not authorized to take any evidence or find any facts;* it merely may send any case back to the Labor Board for the purpose of having it find additional facts (Sec. 10(e)). In this respect, therefore, the Act fails to provide an adequate remedy for the respondent.

In their brief the petitioners assert that the respondents are not entitled to equitable relief until they have exhausted the administrative remedies provided in the Act, and they cite numerous cases in which they assert: "This court has held that failure to resort to the administrative process precluded invocation of 'the extraordinary powers of a court of equity'." The principles laid down in those cases are not applicable here. The only remedy which the Act purports to give the employer, in proceedings such as that which the Labor Board has instituted, is a petition to the Circuit Court of Appeals after an order to cease and desist has been entered by the Board. The Act does not contain any provision whatever for testing the jurisdiction of the Labor Board until after it has entered such an order.

None of the cases cited in the petitioners' brief deals with a situation such as that presented here. None of them supports the broad proposition that, where a statute provides for administrative proceedings for review, a party must follow them through, regardless of injury which may take place while he is doing so, and regardless of the fact that the statute can have no constitutional application to him. The principle which those cases recognize and apply is that, if there is an *adequate* administrative remedy, the

party must avail himself of it. They merely exemplify a particular application of the broader rule that equity will not grant relief where there is an adequate remedy at law. Obviously, if a party could avoid the impending consequences of administrative action by following the administrative processes of review, there would be no reason for equitable relief. In most of the cases cited the decision was reached only after it had been determined that no irreparable loss would be suffered by the party, if he were required to exhaust his administrative remedy. In some of such cases a decree of limited scope was issued by which such injury as might have resulted was obviated. In this connection, see particularly *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission,* 279 U. S. 560, 563; *Porter* v. *Investors' Syndicate,* 286 U. S. 461.

One of the cases cited in this connection in the brief of the petitioners is *Federal Trade Commission* v. *Claire Furnace Co.,* 274 U. S. 160. That was a suit for an injunction against the Federal Trade Commission to enjoin it from requiring certain reports on the ground that the reports demanded called for detailed information respecting the plaintiffs' intrastate activities, as well as their activities in interstate commerce. The plaintiffs in that suit could only be compelled to furnish such reports through application by the Attorney-General to a District Court for writ of mandamus, on which application the question as to the constitutional power of the Commission to require the reports could be tried and determined by such Court. That case did not, therefore, present a situation in which, if the procedure prescribed by the statute should be followed, the plaintiff would be deprived of its right to have the constitutional question involved determined by the District Court

and it is clearly distinguishable from this case. Here, if relief in equity cannot be had, the respondent will be forced to proceed before the Labor Board without opportunity for a judicial determination of the constitutional question involved until after the injury complained of has been suffered.

The brief of the petitioners also quotes an extract from the opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, *supra*, in which the Court said (p. 47):

> "We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

That case involved an appeal from an order issued by the Board and the above-quoted statement can, therefore, refer only to judicial protection against such orders and not to judicial protection against proceedings by the Board that are entirely outside the constitutional scope of the Act.

As stated above, the issue is presented here whether the Act can, within the limits of the constitutional powers of Congress, have any application to the operations of the respondent and its relations with its employees at the Fore River Plant. If it cannot have such application, the administrative procedure prescribed by the Act does not apply and there is no administrative remedy to exhaust.

The expense and damage that must inevitably result to employers and employees from proceedings outside the constitutional scope of the Act are not, as the petitioners assert in their brief, "part of the social burden of living

under government" but is a real burden that is bound to result from unrestrained violation of the constitutional limits of government.

As this Court has pointed out in *St. Josephs Stockyards Co. v. United States, supra,*

> "* * * Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient."

Any attempt by Congress to deprive employers and employees of their right to have the issue as to whether the Labor Board can constitutionally have jurisdiction over them in any particular case determined by a court would be beyond the constitutional power of Congress. This Court has never yet held that any person may thus be exposed without redress to the tyrannies and persecutions that can result from the arbitrary conduct of administrative bodies unrestrained by the customary rules of judicial procedure and subject to all the vagaries of political pressure and bureaucracy.

## III

## NO PROPER GROUND EXISTS FOR REVERSING THE ORDER GRANTING THE PRELIMINARY INJUNCTION.

### 1. The Appellate Court Should Not Disturb a Preliminary Injunction, Except for Improvident Allowance, Violation of the Rules of Equity, or Abuse of Discretion.

In *Rogers v. Hill,* 289 U. S. 582 (1933), this Court said (pp. 586-587):

> "* * * The granting of temporary injunction involved no determination of the merits. Such a decree will not be disturbed on appeal except for improvident allowance, violation of the rules of equity or abuse of discretion."

In *Prendergast* v. *New York Telephone Company*, 262 U. S. 43 (1923), the Court said (at pp. 50-51):

> "* * * It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion. *Meccano Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *Love* v. *Atchison Railway*, *supra*, p. 331; and cases there cited. * * *"

**2. A Preliminary Injunction Should Not Be Disturbed by an Appellate Court Where Irreparable Injury to the Plaintiff May Ensue and the Continuance in Effect of the Injunction Cannot Seriously Harm the Defendant, Unless It Is Entirely Clear from the Record That There Is No Equity in the Bill of Complaint.**

It is also well settled that a court of equity in exercising its discretion as to the granting or withholding of a preliminary injunction has power to balance the conveniences and to grant such an injunction, if the injury which would be sustained by the defendant, should the injunction be granted, is not as great as that which would be sustained by the plaintiff, if the injunction should be refused. That principle is well settled and universally recognized. *Russell* v. *Farley*, 105 U. S. 433, 438-439 (1881); *Ohio Oil Company*

v. *Conway*, 279 U. S. 813, 815 (1929); *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 50, *supra*.

We believe that on the facts shown in this case no harm can result to any one from the continuance in effect of the preliminary injunction granted by the District Court pending a final hearing on the merits, and that a final hearing could have been had and can now be had expeditiously, if the Labor Board will cooperate to that end.

## IV

## CONCLUSION

The decree of the court below should be affirmed.

Respectfully submitted,

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